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COURT FEE ON PLAINT RE-PRESENTED.

The decision of the Full Bench in *Visveswara Sarma* v. *T. M. Nair*[1] is an important pronouncement. It is certain to be welcome to the litigant population and it is in accordance with the existing practice. But it is another question whether it is correct and will command the approval of other High Courts in India or of the Government interested in the public revenue.

The point for decision is whether a plaint returned by a court for presentation to the proper court is properly presented with the cancelled stamp without the payment of a fresh court-fee. The *Chief Justice*, Mr. Justice *Munro* and Mr. Justice *Sankaran Nair*, who composed the Full Bench which gave the affirmative answer, have written separate judgments. It may not be unprofitable to examine the grounds of their judgments.

The principal ground on which the learned Chief Justice rests his judgment is that there is no provision in the Court Fees Act to show that a plaint is unstamped when it is presented on a cancelled stamp. *Prima facie* one would suppose that the word "cancellation" implied that the stamp as a stamp ceased to exist. The Legislature does not speak of a punched stamp or a marked stamp or even a crossed stamp, but prefers to employ the word "cancelled" before "stamp." Unless the word "cancelled" meant to convey the idea that the stamp as such is incapable of being used for any purpose for which a stamp has to be produced, it is impossible to appreciate the propriety of employing this word. S. 12 of the Stamp Act *in pari materia* speaks of cancellation of a stamp "so that it cannot be used again." If cancellation means nothing at all and the stamp retains whatever vitality it possessed before the cancellation, a cancelled stamp which has

1. (1911) 21 M.L.J. 533.

been returned with the plaint by one court may be used for a *different plaint altogether* in the same or another court. The mere statement of this possibility seems to be sufficient to refute the idea that cancellation has no significance. The learned Chief Justice after noting certain arguments against his view relies upon what he presumes to be the Bombay practice. Mr. Justice *Sankaran Nair* also makes the same presumption. But it is difficult to see how the learned Judges are justified in this in the face of the fact that so far as the Bombay Full Bench judgment was concerned, there was only an *obiter dictum* as recognized by the Chief Justice, and in the later case (in 8 Bombay 387) a Division Bench refused to follow that *dictum*.

Mr. Justice *Munro* urges two arguments in support of his view. They are both concurred in by Mr. Justice *Sankaran Nair*. *Munro* J. asks whether there is sufficient reason for the enactment of the rule that a plaint may be returned for presentation to the proper court unless there be an implication that the original stamp on which the first plaint was presented is sufficient for re-presentation. The learned Judge is anxious to assume, for the validity of his reasoning, that the same scale of court fees is in vogue in both courts. It is difficult to realise the necessity for this assumption if the argument is based on the mere language of Order (7), Rule 10, authorising re-presentation to the proper court. The return for re-presentation involves no consideration of the question of stamp. The statement that a plaint returned may be re-presented, has nothing whatever to do with the question of sufficiency of the stamp. If it had been originally presented on insufficient stamps and the plaint was returned for re-presentation without reference to any question of the sufficiency of the stamps, surely, the authority to re-present the plaint would not include a determination as to the sufficiency of the stamps or the incompetency of the second court to refuse to receive the plaint as presented on an insufficient stamp. The reason for the rule authorising return for re-presentation of the identical plaint is certainly to be found in the fact that the second court is enabled to know by the identity of the writing the want of jurisdiction of the former court to deal with the subject-matter of the claim. If a different writing were allowed to be presented

to the second court, there would be no means of knowing, except by taking evidence, that the same claim was made in another court which declined to adjudicate upon it on the ground of want of jurisdiction.

Mr. Justice *Munro's* second argument is that a plaint is not acted upon when it is returned for want of jurisdiction and should not, therefore, be cancelled under S. 30 of the Court Fees Act. Mr. Justice *Sankaran Nair* concurs in this reasoning on further consideration after the hearing, and objects to the cancellation of the stamp on presentation. Both the learned Judges would seem to have overlooked the provision of S. 6 of the Court Fees Act which says that "no document chargeable under the first or second schedule shall be *recorded* in any court or shall be *received* by any public officer unless the proper fee has been paid." The fee payable being required under S. 25 to be in stamps, the determination of the correctness of the stamps is the initial stage before any action can be taken upon the document presented to the court or other public officer. It is certainly difficult to understand that any question of jurisdiction in respect of the claim or relief asked for can be determined without looking at the plaint and understanding its contents with reference to the law relating to jurisdiction. If the time for the determination of the correct stamp is the time of receipt, it seems to be obvious that the time of cancellation is the same.

Mr. Justice *Sankaran Nair* is more positive in his conclusion. He is "clearly of opinion" that no fresh stamp is necessary and that "only one conclusion" can be arrived at in the case. It is unnecessary to canvass such of his arguments as have been already referred to in examining the judgments of the other learned judges. The first argument to which we may refer is his discovery of a fallacy in the opposite conclusion that it overlooks the simple fact that a document does not cease to be properly stamped by the cancellation of the stamp. Notwithstanding the cancellation, he says, the document continues to be properly stamped. The plaint *presented* to a court requires to be properly stamped. The question is only whether a cancelled stamp may be presented to a court and not whether, having been rightly presented, it may afterwards continue on a cancelled

stamp. The fallacy, therefore, would seem rather to lie with the learned Judge's confusion between 'presentation' and 'continuance'

The next argument of the learned Judge is that when a plaint is returned to be presented to a proper court, the cancellation of the stamp must be deemed to have been cancelled. The unsoundness of this supposition will be manifest by supposing that this stamp is used for a very different plaint altogether. If the cancellation is to be deemed to have been set aside, the stamp would be perfectly good as it was in its original condition and capable of being used for any purpose—a position which has only to be stated to carry with it its own refutation.

Another argument of the learned Judge is based on the significance of the law relating to the return of a plaint *at any stage.* What this has got to do with the court fee, it is not easy to understand. It is a mere question of procedure as to how far returns are permissible—whether they should stop at the initial stage or they should be allowed in the first, second or third courts as all are merely continuations of one and the same proceeding. The rule as to the payment of a separate court fee on a plaint re-presented to a different court, must rest upon different considerations relating to the expediency or otherwise of imposing a fresh burden upon the litigating tax-payer.

One more argument deserves to be noticed, and that relates to the stage at which cancellation should be made. It is not contended by the learned Judge that it is wrong to cancel the stamp at the time when the plaint is received. The argument seems to be that it is not obligatory on the court to do so. The learned Judge merely says that the plaint is not acted upon when it is returned for want of jurisdiction. We do not know what warrant there is for putting a limited construction upon the phrase "acting upon." It is used in S. 30 in conjunction with the word "filed." No judicial or other determination is involved in the act of filing. If a plaint is not acted upon when it is returned for re-presentation, how would it be right to say that it is when it is returned for amendment or for insufficiency of stamp or even when it is rejected for not disclosing a cause of action? Surely, it cannot be pretended that in all these cases the plaint has not been acted upon and the stamp was not legally liable to be cancelled, so that it might be competent to the party

to make use of the stamp for a fresh plaint or for any other kind of document.

We are unable to say, with all respect to the learned Judges, that the reasoning on which their judgments proceed is at all convincing. A stamp is properly cancelled at the time of presentation and when the plaint is received. A cancelled stamp is not a proper stamp for a re-presented plaint. The argument of the referring Judges, which is accepted by the learned Chief Justice, based upon the express provision in S. 29 dispensing with a fresh stamp in particular cases and on the repealed provision of sections 20 and 21 which was law for over thirty years, remains, in our judgment, unanswered.

TRANSLATION

OF

APARARKA'S COMMENTARY ON YAGNAVALKYA.

(*Continued.*)

"Of these, the one succeeding, in default of all preceding, gives the pinda and takes the wealth." 132.

Sloka 132. Priority of rights among sons.

Of the sons mentioned, *aurasa*, etc., primary as well as secondary, in default of the preceding, *i. e.*, the preceding son, the succeeding, *i. e.*, the succeeding son, is authorized to give (sraddha) pinda and to take the wealth. Of the substitutes of a son, only the adopted son is accepted in Kaliyuga. Therefore only it is mentioned by Saunaka when dealing with things not in vogue in the Kaliyuga:—

" The acceptance of all others except the aurasa (son) and the adopted (son) in the place of son " is mentioned among things not in vogue.

When an aurasa son is born after a daughter is appointed, Manu deals with what is to be done (then) :

"But, a daughter having been appointed to produce a son for her father, and a son, *begotten by himself*, being afterwards born, the division of the heritage must in that case be equal; since there is no right of primogeniture for a woman." [1]

Manu himself speaks of a peculiarity with regard to the *kshetraja* (son of the wife by a kinsman) :

1. Manu, Ch. IX, § 134.

Sloka 132.

Priority of rights among sons.

"If the two heirs of one man be the son of his own body and a son of his wife by a kinsman, (*the former of whom was begotten after his recovery from an illness thought incurable*), each of the sons exclusively of the other, shall succeed to the whole estate of his natural father." [1]

This (verse) prescribes the power (dominion) of the Dwamushyayana kshetraja in the wealth of the owner of the seed (the natural father), while Vasishta speaks of a peculiarity in the case of the birth of an *aurasa* during the existence of an adopted son : that—

"If after an adoption has been made, a legitimate son be born, (the adopted son) shall obtain a fourth part." [2]

All the varieties of the inequalities of shares are to be determined with regard to the possession of good and bad qualities (by the sharers).

The meaning intended in places where Manu and others classify some of the substitutes of the son as heirs and others as non-heirs even though each of the succeeding among the whole lot takes the wealth in the absence of the preceding (son), is as follows :—"Those substitutes (of the son) who take the wealth of the father's sonless sapindas are mentioned as 'heirs' and not the others."

The author speaks of an exception to all the characteristics mentioned above with regard to the substitutes of the son :

"This rule has been propounded by me in regard to sons equal in caste."

The son of concealed birth and others, who are of the same caste with oneself are alone to be accepted as one's sons, and not others—is the intended meaning.

The son, by a Sudra woman, is procreated by one's self in his own wife and is not a substitute of the son ; but is an aurasa (son of one's own body). Even though he be that, he is mentioned among the "substitutes" by Manu. There the meaning is this : Where there are other *aurasa* sons of the *Anulomaja* [3] caste, the substitute is not accepted ; but even though there

1. Manu, Ch. IX, §.162.
2. Vasishta, Ch. 15, § 9, S. B. E., Vol. 14, p. 76.
3. '*Anulomaja*' means a son of a wife of inferior caste, *e.g.*, a Kshatriya son to a Brahmin and a Vaisya son to a Kshatriya.

Sloka 133.

Illegitimate son's share.

are aurasa sons, the son by a Sudra woman is considered a substitute.[1]

Manu :—" But whether the Brahmin have sons, or have no sons, *by wives of the first three classes*, no more than a tenth part must be given to the son of a Sudra."[2]

The purport is that the wife, etc., of the sonless man gets what remains after (deducting) the tenth share.

" Even a son begotten by a Sudra on a female slave takes a share at his option." 133.

" After the father is dead, let the brothers make him partaker of half a share. If brotherless, he shall take the whole, provided there are no daughter's sons." 134.

A son born of a female slave to a Sudra takes a share at the father's option. The meaning is that whatever share the father desires to give him, becomes his when the father is dead; whatever becomes the share of one of his sons by a married wife, *i. e.*, the brother (of the son of the female slave), half of it shall be given to him.

As for the *brotherless*, *i. e*, a person without brother procreated by the father on a married wife, in the absence of daughter's sons, he shall take the entire wealth of the father. When (the daughter's sons) exist, he shall take only half of the share.* Here, by the mention of a Sudra, it follows that there is no participation of a share in the father's wealth in the case of the son of a female slave procreated by a twice born.

The author speaks of the order of succession in the case of a person who is dead without a son or his substitutes.

"The wife, the daughters also, the parents, brothers likewise and their sons, gotrajas, bandhus, the disciples and the fellow student : of these, on failure of the first, the next in order is the heir to the estate of one who departed for heaven leaving no issue. This rule extends to all classes." 135, 136.

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* Cf. *Mitakshara.*

1. The reading is apparently wrong It should be शूद्रापुत्रेत्वौरसेसत्यपि पुत्रप्रतिनिधिः कार्यएव *i. e.*, even though there are aurasa Sudra sons, a substitute is recognised.

2. Manu, Ch. IX, § 154.

Slokas 133, 134.—Order of Inheritance.

'Sonless' means 'one who has no sons, primary or secondary.' 'Who departed for heaven' means 'who is dead.' 'Is the heir' means 'takes the wealth.' Among persons enumerated in order (beginning with) wives, etc., on the failure of the preceding, the next in order is to be understood. This rule is common to all castes.

Brihaspati :—

"In the revealed texts (of the Vedas), in the traditional law (of the Smritis), and in popular usage, the wife is declared to be half the body (of her husband) equally sharing the outcome of good and evil acts. Of him whose wife is not dead, half his body survives. How should any one else take the property, while half his body lives ?

Although kinsmen (sakulyas), such as parents, brothers uterine (and otherwise), be living, the wife of him who dies without leaving male issue shall succeed to his share. A wife deceased before (her husband) takes away[1] his consecrated fire *(agnihotra)* ; but if the husband dies before the wife, she takes his property, if she has been faithful to him. This is an eternal law.

After having received all the movable and immovable property, gold, silver, grains, liquids and wearing apparel, she shall cause his monthly, six-monthly and annual sraddhas to be performed.

Let her propitiate with funeral oblations and pious liberality her husband's paternal uncles, gurus, daughter's sons, sisters and maternal uncles of the husband, also aged or helpless persons, guests and women (belonging to the family). Should agnates *(sapindas)* or cognates *(bandavas)* or enemies injure the property, let the king inflict on them the punishment destined for a thief."[2]

Vishnu :—The wealth of a man who dies without male issue goes to his wife ;

on failure of her, to his daughter ;

on failure of her to his father,

on failure of him, to his mother;

on failure of her, to his brother;

on failure of him, to his brother's son ;

on failure of him, to the relations called bandhus ;

on failure of them, to relations called sakulyas ;

on failure of them to a fellow student ;

(1) is burnt by the agnihotra fire ; and the husband, if he wishes to have again the agnihotra should again get himself married.

(2) Cf. S. B. E., Vol. 33, pp. 377, 378, Brihaspati, Ch. 25, § 46-52.

on failure of him, it goes to the king, with the exception of a Brahmana's property." 1

Slokas 135-136.

Order of Inheritance.

Brihaspati :—

" Where a man dies leaving no issue, nor wife nor brother, nor father, nor mother, all his sapindas shall divide his property in due shares." 2

But Sankha mentions a different order that:

" Then, the wealth of a man who has departed for heaven (dies) sonless goes to the brother. In his absence, the mother and father get, or, the eldest wife.

Devala :—" Then, the uterine brothers shall divide the wealth of the person dying sonless; or daughters of the same caste or the father who is living; or the brothers of the same caste; or the mother or the wife, in order."

Narada also :—

" If among several brothers one childless should die or become a religious ascetic, the others shall divide his property, excepting the stridhana. They shall make provision for his women till they die, in case they remain faithful to the bed of their husband. Should the women not (remain chaste), they must be cut off that allowance."3

" Unless it should be the property of a Brahmin, a king devoted to duty must allot a maintenance to his women. Thus has the law of inheritance been declared.4

In order to establish their (the texts') authoritativeness devoid of their conflict, it should be mentioned that these texts which are in apparent conflict with one another relate to distinct matters. In this matter, some say: that the text, " wife, daughters" etc., relate to the wife who desires a son from a brother-in-law or other sapinda with the permission of elders like the father-in-law, etc. That is not the proper meaning as (thereby) the conflict with various other smritis cannot be avoided. Is it not?— "*Niyoga* is not through covetousness of wealth"—so says Vasishts.

By this text, it is laid down that she who takes the wealth is not fit for *niyoga*. But it may be said that *niyoga* need not be after taking (the wealth). After being permitted (for *niyoga*) previously, the subsequent participation of wealth may be (taken to be ordained) by the text " wife, daughters, etc." 5

1. S.B.E., Vol. 7, p. 68 Vishnu, Ch. XVII § 4-13.
2. S.B.E., Vol. 33, p. 379. Brihaspati, Ch. XXV § 60.
3. S. B. E., Vol. 33, pp. 195, 196. Narada, Ch. XIII, § 25, 26.
4. S. B. E., Vol. 33, p. 202. Narada, Ch. XIII, § 52.
5. Yagnavalkya, 135.

Slokas 135-136.

Order of Inheritance.

That is not proper. If so, by the *kshetraja* son that is to be born, the deceased owner of wealth becomes a person with a son. By the text (here) it is laid down that "the sonless man's wealth shall be taken by the wife, daughters," etc.

Therefore only Manu :—

" He who keeps the (*fixed and moveable*) estate of his *deceased* brother, maintains the widow, and raises up a son to that brother must give to that son, (*at the age of fifteen*), the whole of his brother's (*divided*) property. [1]

The meaning is that (the wealth) belongs to him (the child), but not to the mother.

" If the widow of a man, who died without a son, raise up a son to him by one of his kinsmen, let her deliver to that son (*at his full age*) the collected estate of the deceased, whatever it be."[2]

" To him ":—to his descendant, *i. e.*, to his son. Even that desire in *niyoga* by being opposed to the participation in wealth, how can it be the cause of *niyoga*. Gautama is explicit as regards the opposition between *niyoga* and participation of wealth (in saying) thus:—

"Sapindas, sagotras, or those connected by descent from the same Rishi, and the wife shall share (the estate) of a person deceased without (male) issue; or the (widow) may seek to raise offspring (to her deceased husband [3].)

By this text, the alternative nature of the taking (by a woman) of a sonless husband's wealth and her desire for *niyoga* indicated by the desire to get a seed is laid down. Therefore, the conflict is obvious. Vridhamanu also by saying that :—

" The wife who is sonless and, being chaste, protects the bed of her lord—(she) alone—shall offer the pinda and take the entire share of (his) wealth":—

makes it clear that there is no taking of wealth to her who has desire in *niyoga*. If so (if the idea is that a woman who has had permission previously for *niyoga* can take the wealth) the words " who protects the bed of her lord " should not have been expressed. Therefore, this distinction (expressed) above does not fit in. Then how to avoid the conflict? It is (now) mentioned: The wife who is endowed with the qualities mentioned

1. Manu, Ch. IX, § 146. 2. Manu, Ch. IX, § 190.
3. S. B. E., Vol., 2, p. 302. Gautama, Ch. XXVIII, 21, 22.

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by Manu (in the text)-"a wife who is sonless and protects the bed, etc".—(she) herself takes the entire wealth of the husband even when his (the husband's) father and brothers are living and she performs the husband's shraddha etc. To the same purport, it has been mentioned by Brihaspati as follows:—

To a father, the funeral ball (pinda) and water oblation shall be offered by his son; in default of a son, the widow (succeeds); in her default, a uterine brother.' [1]

So, she who has properly served her husband possessing wealth earned by himself without detriment to the paternal estate, and who is with her senses subdued, takes the entire wealth of her husband, even when her brothers-in-law are living. But if she is likely to be unchaste on account of her youth, etc, even when she is alive, the deceased husband's wealth goes to his brothers and not to his wife. In that matter too, this is the rule:—

If the brothers had acquired wealth jointly without detriment to the paternal estate, then even if the father be living, the brothers alone are the participators in the wealth; if the wealth had been acquired by the father or grandfather, then the participation is not with the brothers, but with the parents. This decision is without conflict to all texts. It should not be asked that (as) a wife if alone, (*i.e.*, whose husband is dead) is not fit for performing sacrifices how can she take wealth which is produced for the purpose of (performing) sacrifices. For there is no authority (for the position) that the production of all kinds of wealth is for the purpose of sacrifice.

What production of wealth is ordained by the text like the following?.

" One should acquire wealth being under vow for twelve nights" [2]—that acquisition alone is for sacrifice. That which is acquired otherwise is for the (use of the) individual.

Therefore the (अर्थवाद्) Artha Vadha text:—

"Therefore women are without energy and do not inherit."[3]

This is to be applied in its appropriate place as it explains a *vidhi* already laid down elsewhere (अनुवादकत्वात्). Therefore,

1. S. B. E., Vol. 33, p. 380, Brihaspati, Ch. XXV, § 65.
2. It is not known where this quotation comes from.
3. Taitriya Samhita, 5th Prapataka. 8th Anuvaka.

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(for this reason) this should be commented as applicable to a case where there is a son. There is competency even for a husbandless woman (a widow) to perform acts of pious liberality. (पूर्त) (as digging a well, planting a grove, building a temple etc.) As there is that competency they will spend wealth in that behalf. As for what has been laid down by Narada after saying—

"If among brothers one die issueless, etc."[1]

"They shall make provison for his women till they die"

it should be understood as applicable to a remarried woman, adulteress, etc.—because of the use of the term "woman" (स्त्री). But the term "wife" (पत्नी) is applied only to a woman who is connected by marriage and in sacrifices by reason of the Panini Smriti (Sutra) that (नु) n̄ *is added* to the word पति: *pati* when connection with (यज्ञसंयोगे) sacrifice is meant. On the failure of such wife (as the above), daughters of equal caste with the father become owners of the wealth of the person who has no son.

Narada :—"On failure of a son, the daughter (succeeds), because she continues the lineage just like (a son); both a son and a daughter continue the lineage of their father."[3]

Similarly—

"The son of a man is even as himself; and as the son, such is the daughter thus appointed : how then, *if he have no son*, can any inherit his property, but a daughter, who is closely united with his own soul."[4]

Brihaspati—

"To men a daughter, like a son, springs from every limb of the body ; how then should any other mortal inherit the father's property while she lives ?"

Equal (in caste to her father) and married to a man of the same caste as her own, virtuous, habitually submissive, she shall inherit her father's property, whether she may have been (expressly) appointed or not."[5]

Equal means: equal in caste. Therefore, for a daughter of an unequal caste there is no competency for inheriting wealth. *Kritâkritâ* means appointed daughter. Here, by the term *Kritâkritâ*, the appointed daughter is mentioned as an example.

1. S. B. E., Vol. 33, p. 195. Narada, Ch. 13, §. 25.
2. S. B. E., Vol. 33, p. 196. Narada, Ch. 13, §. 26.
3. S. B. E., Vol. 33, p. 201. Narada, Ch. 13. §. 50.
4. Manu. Ch. IX §. 130.
5. S. B. E., Vol. 33, p. 378. Brihaspati, Ch. 25, §. 56, 57.

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But, the taking of a sonless father's wealth is not laid down by this text. We cannot, of course, call a father with an appointed daughter a sonless man, the appointed daughter herself being the son. So also Vasishta :—

"The third is known from the Vedas as an appointed daughter."[1]

By the meaning given above, the meaning given by some that the word "daughter" in "wife, daughters, etc."[2] means "appointed daughter" is to be taken as having beeen repudiated. 'Parents' means the mother and father. They become the inheritors of the wealth of a son in the absence of his wife and daughter.

Brihaspati :—

"When a man dies without leaving either wife or male issue, the mother has to be considered as her son's heiress, or a brother (may succeed) if she consents to it."[3]

Manu:—

"On a son dying childless *and leaving no widow*, the father and mother shall take the estate ; and the mother also being dead, the paternal grandfather and grandmother shall take, *on failure of brother and nephews.*"[4]

On failure of the parents, the brothers, and they—only the uterine brothers, being connected very closely—being the performers of sradh to the same maternal line, the step-brothers not being (that). As for the text of Sankha Likhita and Paitinasi :—

"Then, the wealth of a man who has departed for heaven (dies) sonless goes to the brother. In his absence, the mother and father get; or, the eldest wife."

This (and other texts like this) should be understood in reference to the wealth acquired without detriment to the patrimony and partitioned among the brothers: If there are no such brothers, the parents or the eldest wife.

As for the brothers of different characteristics other than those above mentioned, they should be considered as taking the wealth after the order mentioned by Yagnavalkya. Thus, there is no conflict. As for what has been said by Devala. :—

1. S. B. E., Vol. 14, p. 85. Vasishta, Ch. 17, §. 15
2. Yagnavalkya, 135.
3. S. B. E., Vol. 33, p. 379. Brihaspati, Ch. 25, §. 63.
4. Manu, Ch. IX, §. 217.

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" Then, the uterine brothers shall divide the wealth of the sonless brother; or the daughters of equal caste; or the father who is living: or the step-brothers of equal caste; or the mother; or the wife, in order."

There too, the brother's right of taking the wealth first in accordance with the decision expressed with regard to the text of Sankha should be understood. On the failure of brothers, their sons; on their failure, the gotrajas. Among them, those who are near are participators of wealth. So also, Manu says:—

" To the nearest sapindas, the inheritance belongs."[1]

" Nearness" has been dealt with by himself (Manu.)

" To three *ancestors* must water be given at their obsequies; for three (*the father, his father and the paternal grandfather*) is the funeral cake ordained, the fourth in *descent* is the giver *of oblations to them and their heir, if they die without nearer descendants*; but the fifth has no concern *with the gift of the funeral cake*."[2]

To him who gives oblations of water, etc., to the three ancestors who are the persons with regard to whom the oblations are meant, an individual who gives oblations of water to the very same (three) ancestors is the nearest sapinda. Therefore, a uterine brother is the nearest sapinda by reason of his being the giver of water oblations to the very same (three) ancestors. But his (the brother's) son is a little bit removed by reason of the pinda for his father being different. His (brother's) grandson is more removed by reason of the pinda for his father and grandfather being different. His son is very much removed, as there is separateness in the giving of (all) the three pindas. Thus, the brother, his son and his grandson, the three on the father's line, are the near sapindas. Thus also in the grandfather's and great grandfather's line.[3] On failure of these, the three begining with son, etc., of the great grandsons of the three beginning with the father, etc., take the wealth by reason of their sapindaship. On the failure of gotrajas, bandhus, *i. e.*, father's sister, mother's sister, maternal uncles and their sons, etc. On failure of a bandhu, the disciple, *i.e.*, one to whom initiatory (thread) ceremony has been performed and Vedas have been taught (by the owner of the wealth) becomes the participator of the wealth. On his failure a co-disciple, *i.e.*, one who had the same preceptor. As for what has been laid down by Katyayana:—

1. Manu, Ch. IX, §. 187.

2. Manu, Ch. IX, §. 186.

3. Cf. Mitakshara, where the sapindaship stops with brother and his son only and likewise in the other lines.

" On failure of a son, the father shall take the wealth of a divided (co-parcener) ; or the brother or the mother or his father's mother in order."

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Thus, the term 'on failure of a son' is for the purpose of illustration. By that it is to be understood that it is on failure of the wife and daughter. On failure of the father, the mother ; or with the permission of the mother, the brother, on account of the text :—

" The mother should be known as the inheriter of the wealth, or the brother with her permission."

On failure of all these, the deceased's paternal grandmother, after the daughter and daughter's son.

Brihaspati :—

" In default of them, uterine brothers or brother's sons, agnates (sakulyas) and cognates (bandhavas), pupils or learned Brahmans are entitled to the inheritance."[1]

Narada :—

" On failure of daughters, the sakulyas (are to succeed) and (after them) the bandhavas ; next, a member of the same caste. In default of all, that (wealth) goes to the king, unless it should be the property of a Brahmin. A king devoted to duty must allot a maintenance to his women. Thus has the law of inheritance been declared."[2]

Here, by the term "on failure of the daughters" is implied the failure of the father also. " His women" include an unmarried (kept) woman, an adulteress or a remarried widow.

" On failure of all these, the lawful heirs are such *Brahmins*, as have read the three *Vedas*, as are pure in *body and mind*, as have subdued their passions ; and *they must consequently offer the cake*; thus the rites of obsequies cannot fail."

" The property of a Brahmin shall never be taken *as an escheat* by the king ; this is a fixed law : but the wealth of the other classes, on failure of all heirs, the king may take."[3]

The king is the protector of the country.

Brihaspati :—

"Should a Kshatriya, Vaisya, or Sudra die without leaving male issue, or wife, or brother, their property shall be taken (as escheat) by the king, for he is the lord of all."

Paitinasi:—

The property of a learned priest descends to Brahmanas[5] and not to the king; wealth consecrated to the gods, or allotted to

1. S. B. E , Vol. 33, p. 379. Brihaspati, Ch. 25, §. 59.
2. S. B. E., Vol. 33, pp. 201, 202. Narada Ch. XIII, §. 51, 52.
3. Manu, Ch. IX, §. 188, 189.
4. S. B.E., Vol. 33 p 380, Brihaspati, Ch. 25, §. 67.
5. Parishad.

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priests, must not be seized by the sovereign, nor a deposit open or sealed, nor wealth regularly inherited, nor the property of infants or women: thus the Veda expresses.

The wealth of a woman must not be seized by the king nor *acquired* effects of an infant. The wealth of a woman is acquired in six modes.1

The wealth of infants is that inherited from the father (ancestors.)

The Smiriti says:—He who takes the wealth of another shall perform his sradh and shall offer the pinda to three ancestors.

By "three ancestors" is meant sradha on the new-moon day.

Vishnu:—The son shall offer the pinda even though he does not get the father's wealth.

Some (persons) question with regard to the text "wife, daughters, etc.":—How? It is only for women with husbands (who have their husbands living) there is competency with regard to sacrifices and acts of pious liberality and not for single women (widows). Because by reason only of the death of the husband gratification of the senses cannot be indulged in, but severe penance only is to be practised, and wealth not utilized in charity or in gratification of the senses does not become wealth for the attainment of the (four) objects of human life. Therefore when there live people like the father, etc., who are fit (to take) the wealth which can be utilized in charity and in the gratification of the senses, the wife does not inherit. Therefore, the wife should take only (so much as is sufficient) for her sustenance out of the wealth of a sonless deceased man and not more. Therefore, the text relating to the inheritance of the wealth by the wife is with regard to that (the above mentioned matter). The inheritance by the daughter laid down by this text is with regard to the wealth of a wifeless deceased man which is barely sufficient for (meeting the expenses of) the marriage of the daughter. It should be understood, by the reason of the texts of Sankha and others, that only sapindas *i.e.*, the father, etc., are the inheritors of the balance, even though the wife and daughters are in existence. That is not correct. What the divine master (Yagnavalkya) has said in connection with the devolution of ownership on the death of the (previous) owner of the wealth is correct. The ownership exists (already) in the wife and daughters and need not be created (newly).

1. Cf. Colebrook, Vol. II, 573. §. 447.

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By the texts of Apastamba begining with "by marriage arises) companionship" it is laid down that marriage itself creates the ownership of the wife in the husband's wealth. It should be understood that in the case of daughters, ownership in the father's wealth arises by birth itself as in the case of a son. Therefore, when (either) the wife or daughter is living, the ownership of the father, etc., cannot be inferred from this text in supersession of their (the wife's and daughter's) ownership: because otherwise the text becomes liable to the defect of diversity in form in that the ownership is laid down even without any necessity for supersession on default of the wife and daughters.

In order to avoid that (that flaw), it should be understood in this text [1] that the participation of wealth by the father, etc., (is laid down) only on failure of the wife, etc. As for what is laid down by Sankha and others about the inheritance by the wife on failure of the father, etc., it should be understood that it is with reference to cases where the wife loses ownership in the husband's wealth (ownership used in reference to the terms authority, etc.) for other reasons. The other reasons have been mentioned. With reference to the loss of ownership of the wife in the husband's wealth (it has been laid down)—

"Being deprived of her rights, squalid,"[1]

Therefore the rule suggested is the proper one. As for what was said with regard to the excess over and above what the women require for their sustenance as being useless—even that is not correct. Has it not been said that widows are competent to do acts other than those performable with mantra or fire, *i. e.*, acts of pious liberality[2]? There is authority for them to use the wealth, that is, used in the discharge of their religious duties.[3]

Then the author speaks of the inheritors—in their order—of the wealth of deceased people belonging to orders other than that of the house-holder.

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1. Sanka's text:—The wealth of a man who has departed for heaven sonless goes to the brother. In his absence, the mother and father get or the eldest wife."

2. Yagnavalkya. Colebroke II, p. 135, §. 82.

3. स्वधर्म and not स्वतन्त्र.

NOTES OF INDIAN CASES.

Govindasami Tevan *v.* Dorasami Pillai.—I. L. R. 34 M. 119.—The case seems to be a simple one. There were two mortgages. The mortgagor sold the equity of redemption to a third person who was directed to pay off both the mortgages. The vendee paid the prior mortgagee but not the later, who thereupon sued to enforce his mortgage. There was no question as to the validity of the sale. The vendee was bound to discharge the incumbrance existing on the property especially when he was under an obligation to discharge the same by virtue of his sale deed. Under those circumstances we fail to see how there can arise any question of subrogation.

The Official Assignee of Madras v. Lupprian.—I. L. R. 34 M. 121—A preliminary question was raised in this case as to whether an appeal would lie under the latter part of S. 15 of the Letters Patent where there is a difference of opinion among the Judges herein in insolvency matters under appeal. The argument that no appeal would lie was founded upon S. 73 11 & 12 Vict., Ch. 21. Such a question will not arise under the new Insolvency Act III of 1909. S. 8, Sub-S. 2, Cl. (*b*), provides that an appeal from an order made by a Judge in the exercise of insolvency jurisdiction conferred by the Act will be subject to the same provisions as an appeal from an order made by the Judge in the exercise of the ordinary original civil jurisdiction of the High Court.

After the Letters Patent the Court for the Relief of Insolvent Debtors was to be held by one of the Judges of the High Court of Judicature and such Judge and High Court were vested with original and appellate jurisdiction conferred by the Insolvency Statute. S. 73 of the Insolvency Statute gave a right to a person aggrieved by any adjudication, order or proceeding of an Insolvent court to present a petition to the Supreme Court of Judicature and it further enacted that an order made upon such petition should be final and conclusive as to all parties. We doubt very much whether there is any, "adjudication or order" within the meaning of this section where there is a difference of opinion among the two Judges who hear the petition under S. 73. This section does not say that in case of such difference of opinion the opinion of the Senior Judge shall be final. The procedure in the case of a difference

of opinion is pointed out in S. 36 of the Letters Patent but that is subject to the provisions contained in S. 15. Apart from this the reasoning of the learned Judges based upon the construction of S. 11 of 24 & 25 Vict. C. 104 is conclusive upon the question. This section enacts that the provisions in the several Acts of Parliament and the Acts of the Legislature of India, etc., applicable to Supreme Courts shall be applicable to the said High Courts only when they are consistent with the provisions of the said High Courts Act and of the Letters Patent. We have no doubt that the principle laid down by Mr. Justice *Abdur Rahim* in I.L.R. 33 M. 145 that a mere direction by a customer to buy Government Promissory notes out of the money standing to his credit in current account followed by a promise on the part of the banker to carry out the direction without anything more would not constitute the banker a trustee or a bailee so as to enable the customer to follow the property. We think that is also substantially the principle laid down by *Miller* J. upon further appeal under the Letters Patent. In the head note by the Law Reporter *Miller* J. is reported to have decided that a mere direction by a customer to a banker does not alter the relationship between a banker and customer while *Munro* J. is reported to have decided (dissenting from his former judgment) that a bare undertaking by the banker to carry out such directions cannot have the effect of transferring the ownership from the banker to the customer. This would seem to suggest that either *Miller* J. did not decide anything about the effect of the undertaking by the banker or that he intended his judgment to be based upon a line of reasoning which was different from that adopted by Mr. Justice *Munro*. If it was the former suggestion it would not be correct as the judgment of Mr. Justice *Miller* is clear that an undertaking on the part of the banker to carry out the direction will not alter the relationship between the banker and customer. As observed by him " there must be something to show that the banker did not merely undertake to change the position in the future but that by taking some step to apply money or otherwise he did effect a change of position." In other words, according to the learned Judge, a mere undertaking on the part of the banker to carry out the customer's direction without taking some steps to give effect to that undertaking would not alter the relationship.

The reporter may be correct in stating that Mr. Justice *Munro* has held that a bare undertaking on the part of the banker to carry out the customer's directions will not have the effect of transferring ownership.

The reporter in giving this as the decision of Mr. Justice *Munro* states that he dissents from his former judgment. This may seem to suggest that in the former judgment Mr. Justice *Munro* decided exactly contrary to the principle laid down by him now. If that is so that would not be correct. It could not be said that in the former judgment Mr. Justice *Munro* held that a bare undertaking on the part of the banker would have the effect of transferring the ownership. On the contrary his former judgment would seem to suggest that a mere direction by a customer with reference to money standing to his credit would not affect the relationship between the banker and the customer and that upon the fact, of the case there was a trust accepted by the banker. The case reported at p. 128 is a further application of the same principle, viz, that if once there is a relation between banker and customer such relation continues unless there is some step taken which has in law the effect of altering that relationship. Here there was a fixed deposit and the time had expired and according to the conditions of deposit no interest was payable after that date unless the deposit was renewed. The customer demanded repayment but that, however, would not alter the relationship until as a matter of fact the demand was adjusted to the satisfaction of the customer. A simple demand and a promise to repay would not amount to an agreement on the part of the banker to hold money in trust for the debtor. In the case reported at p. 125 the money was treated or held under a suspense account pending negotiations. The majority held that that made the bankers the owners of the money and that there was only a relationship of debtor and creditor. We think there is considerable force in the reasoning of Mr. Justice *Abdur Rahim* that there could be no relationship of debtor and creditor without a contract and that when the parties could not agree as to the terms on which the money was to be held in deposit the mere fact that the money was paid by a person under certain terms which were not agreed to by the banker and that the banker stated that he would hold the money in

suspense pending negotiations would not make him a creditor and would not entitle him to use the money before the negotiations were complete.

Sree Raja Datla Venkata Surya Narayana Jagapathi Raju v. Golulguri Bapiraju.—I. L. R. 34 M. 143.—We think the distinction drawn by the learned judges between cases of benami and agency is well founded in principle. An agent for an undisclosed principal may well maintain a suit with reference to the contract entered into by him—whether such a suit be for enforcing or for seeking to avoid such contract—and the law which holds that a benamidar cannot maintain a suit can have no application. Further the cases, assuming them to have been well-decided, and assuming also that they cannot be reopened, only hold that a benamidar is not entitled to maintain a suit for possession. They are no authority for the view that the benamidar is not entitled to maintain a suit for setting aside the transaction for fraud or any other valid ground known to the law.

Again, where a person is a purchaser at court auction and his purchase has been certified by the court, the real owner will not be entitled to maintain a suit against the certified purchaser on the ground of benami. See S. 66 of the New Civil-Procedure Code (cf. S. 317, old C. P. C.). If that be so, we do not know whether a plea of benami will be open to a person so as to defeat the certified purchaser's title to sue for recovering property. S. 65 (cf. S. 316, old Code) declares that the title to the property is vested in such purchaser. There is a statutory vesting of title, and we fail to see how he cannot maintain a suit for possession. Whether a plea of benami is open to a defendant or not, the statutory title clothes the purchaser with a right to sue, and if he can sue for the land he can also sue to set aside the sale on any valid ground open to him.

Munusawmi v. Maruthammal.—I. L. R. 34 M. 211. —The conclusion come to by Mr. Justice *Wallis* that an executor who has accepted the office is estopped from setting up an adverse title to the property dealt with by the will requires more consideration than has apparently been given to it in the judgment. The learned *Chief Justice* who agrees with Mr. Justice

Wallis puts it on the bare ground that possession was taken under the will as executor. We are inclined to agree with Mr. Justice *Miller* that unless the beneficiaries can show that their position has been altered by the act or conduct of the executor accepting office, no question of estoppel can arise. The acceptance of the office and the taking of possession are only some of the ingredients which go to make up the estoppel. There is nothing peculiar in the estoppel created by the conduct of an executor. Both under the English law and the Indian Evidence Act, S. 115, it has to be proved that the act or conduct has led to the party who can invoke the aid of estoppel being prejudiced. The case of *Srinivasa Murti* v. *Venkata Varada Iyengar*[1] can be supported on the ground, as pointed out by Mr. Justice *Miller* that the estoppel was pleaded as between co-executors and that the position of the executors was altered by the conduct of their co-executor.

In a very recent case—*Williams* v. *Evans* [2]—Mr. Justice *Horridge* points out that an executor who is also next of kin and who takes out probate with the knowledge of all the facts is not estopped from contesting the validity of the will. The learned Judge points out that in the only reported case in England—*In the goods of Chamberlain* [3]—the executor could have taken possession only under the will of which he took probate. In the present case, as well as in *Srinivasa Moorthy case*[4], possession taken, although professedly under the will, is consistent with the right of the executors to retain it in their capacities as heirs as well. The Privy Council, on appeal against that decision[5] qualify the dictum as to estoppel in these words:—"To such a contention advanced under such *circumstances*, it would be a sufficient answer to say that no person who has accepted the position of a trustee and has *acquired property in that capacity* can be permitted to assert an adverse title on his own behalf, until he has obtained a proper discharge from the trust with which he clothed himself." It is clear that Lord *Macnaghten* in this sentence is not accepting the broader proposition that the acquisition in the capacity of trustee estops him from setting up for ever

1. (1901) I.L.R. 25 M.
2. (1911) 38 I. A. 129 at p. 136.
3. (1911) Prob. Div., p. 175.
4. (1867) L.R. 1 P. & M. 316.
5. (1911) 21 M.L.J. 669.

an adverse title. His Lordship confines the bar to the period during which the trusteeship continues. After rendering an account of the trusteeship, it is open to the trustee to claim that the original trust was invalid. This is analogous to the estoppel against a tenant. See S.116 of the Evidence Act. One other point to be noticed is that Lord *Macnaghten* refers only to the position of a trustee although the learned judges of the High Court regarded an executor as occupying the same position. Further the *circumstances* referred to by the Privy Council probably refer to the distinction suggested by Mr. Justice *Miller*. The question is not whether possession was taken as executor, but whether it is inconsistent with any other right which can be set up later on. Mr. Justice *Horridge* points out that "three things are necessary to constitute estoppel : (1) a representation made ; (2) that is untrue ; and (3) that the party to whom it is made acted on it to his detriment." We conceive that the Indian law whether founded on the Evidence Act or based on general principles as to estoppel will also require compliance with these three requirements ; and unless the acts of an executor satisfy all these conditions, he will not be estopped from contesting the validity of the will. Under any circumstances, the head note of the reporter is expressed too widely and is calculated to convey the impression that the acceptance of office by an executor concludes him unconditionally.

SUMMARY OF ENGLISH CASES.

Lindsay v. Klein. [1911] A. C. 194 (Sc.)

Ship—Unseaworthiness soon after commencement of voyage—Onus of proof.

Although the burden of proving unseaworthiness lies upon those who assert it, yet in cases where it occurs soon after the commencement of the voyage the presumption of seaworthiness is rebutted and the onus shifted.

The Corporation of Glasgow v. Lorimer.

[1911] A. C. 209 (Sc.)

Master and servant—Slander by servant—Liability of master—Scope of authority.

A municipal tax collector whose duty consisted in collecting the taxes due from owners of houses, not only charged a house-

owner, who was allowed to pay his taxes of the year in instalments, with forging a previous receipt of the year by altering the amount paid into a higher figure, but repeated the charge in the house of a neighbour.

Held that the municipality was not liable for the slander, as expressing one's opinion on such matters, instead of communicating the same to the superiors (in other words slandering others) was not shown to be within the scope of the servant's authority.

Cathcart v. Chalmers. [1911] A. C. 246 (Sc.)

Landlord and tenant—Tenant's statutory right to compensation for improvements—Contracting out of such right—Illegality.

An Act of Parliament gave the tenant right to claim compensation from the landlord, up to the date of his quitting the premises, for improvements effected by him, and declared void any contract depriving the tenant of his right to compensation. The contract in the particular case was that the tenant should not claim compensation unless he gave notice at least a month before the actual determination of the tenancy.

Held that the contract was void and not enforceable by the landlord as it deprived the tenant of his right to claim compensation except under certain conditions, *i. e.*, in that it deprived him of his right to claim up to the last moment of his tenancy as provided by the Act.

Eaton v. Buchanan. [1911] A. C. 253 (Sc.)

Trustee—Compromise on advice of law agent—No negligence—No personal liability of trustee—Annuities not declared a charge on reality—No duty upon trustee to make them burdens on reality.

Where a disturbant does not declare certain annuities created thereby as charged upon the real estate, no duty lies upon the trustees appointed by the real estate to make them a charge thereon.

A testator disinherited some of his children, gave annuities to others, and the residue of all his property to a particular son of his. The disinherited children threatened, on the death of the testator, to set aside the will on the ground of want of capacity

and undue influence. Thereupon the trustees, acting on the advice of an agent of acknowledged character in the profession, compromised the claims, agreeing to pay certain sums which they borrowed on the security of the real estate. Without making annuities a charge upon the real estate they handed only the real estate to the residuary legatee. The real estate, which continued from the time of the testator to be used in a business which he was carrying on, was practically lost on account of the failure of the business, and there were not sufficient funds to pay the annuities.

Held, in a suit by the annuitants against the trustees, that the trustees were not guilty of breach of trust or negligence in compromising the claims of the disinherited children in as much as they acted upon proper advice and with ordinary prudence and care as they would have done in their own business.

International Sponge Importers, Ltd. *v.* Andrew Watt & Sons. [1911] A. C. 279 (Sc.)

Sale of goods through agent—Instructions to purchasers—No prohibition of cash payments through agent—Misappropriation of cash payments—Buyer not liable.

Some of the printed notices and circulars issued by the plaintiffs, who were trading through their travelling agents in various articles, contained no express instructions prohibiting buyers from agents from making cash payments to them, but only intimated that cheques should be crossed in a certain way and that cheques should be drawn payable to plaintiffs. After two or three years' dealing, the defendants, who were regularly buying from a certain travelling agent and paying him only by cheques drawn in favour of plaintiffs, once paid in cash owing to the fraudulent practice of the agent who afterwards misappropriated the same. Though intimation of that sale for cash was given by the agent to the plaintiffs, the same was not found out by them owing to the books having been tampered with by their employees who conspired to cheat the plaintiffs. No intimation therefore having beeen given to the defendants that payment ought not to be made to the agent,

the defendants began, a year thereafter, to pay the agent in cash and also by cheques drawn in his favour. The agent having misappropriated the same, the suit was brought to recover the money from the defendants on the allegation that the defendants' payments were in violation of the terms of their business.

Held that the plaintiffs must fail as (1) there was no express prohibition of cash payment and (2) as the plaintiffs failed to apprise the defendants for some years of their mistake in paying the agent.

Smith v. Cock. [1911] A.C. 317 (P. C.)

Contribution—Two separate trust estates—Same beneficiary—No right of contribution.

It was said that there being two trust estates from which payments towards the maintenance of one and the same *cestui que trust* were to be drawn, the doctrine of equitable contribution ought to be applied by apportioning the payments between the two estates. Without attempting to give a comprehensive definition of the expression "equitable contribution," it is clear that the present case does not fall within it. Before there can be any question of contribution there must be a common obligation upon those who are required to contribute. Here there is none. The trusts are not only different in their terms but each trust requires a separate and independent exercise of the discretion of the trustees of the particular estate as to the sum to be paid by that estate to Alice. When that discretion has been exercised it may be said that a consequent obligation arises to pay the amount, but it is a separate obligation which has no connection with the obligation upon the trustees of the other estate, and cannot, therefore, afford any ground for a claim to contribution. The order appealed from seems to require the two sets of trustees to meet together and fix the amount to be paid to Alice, and then to apportion the amount between the two estates. This would cause the sum payable by each estate to depend upon the joint discretion of two sets of trustees—a state of things never intended either by John Mathew Smith or by Lucy Smith. It would be to defeat instead of to carry out the intention expressed in the wills which created the trusts.

Rex v. Canadian Pacific Railway. [1911] A.C. 328

"Grant from the Crown"—Meaning of.

The proper meaning of the expression "grant from the Crown" in the case of a land grant is a conveyance by letters patent under the great seal. And although, of course, crown lands may be transferred to a subject by Act of Parliament, such a transfer would not ordinarily or properly be described as a "grant from the Crown."

Greyvensteyn v. Hattingh. [1911] A. C. 355.

Damages—Suit for—Damages the result of defendant's self-protection—No right to sue.

Defendant drove away a swarm of locusts which were coming to his field from the direction of the adjoining field which belonged to the plaintiff, with the object of averting damage to his own crops ; the result of this was that the locusts naturally settled in plaintiff's field and damaged his crops.

Held that the defendant's action being in self-protection the planitiff had no cause of action.

Per Curiam:—The obstruction and diversion of the natural and ancient course of a stream in times of flood cannot be legally made by one proprietor so as to create a new waterway to the prejudice of other proprietors. But the principles of law laid down for preserving or regulating the settled course of a river, on which may depend so many of the rights and benefits of adjacent owners are not necessarily appropriate to the course of an insect pest, which it is the interest of every one concerned to repel or destroy. The supposed analogy between the two things is wholly fallacious. The pest has no settled course, and whatever its course may be, no one is bound to respect it. Indeed the progress of a fire would be a much nearer analogy to the moving horde of locusts than the course of a river.

In *Whalley* v. *Lancashire & Yorkshire Railway Company*[1] *Lindley* L. J. points out that if an extraordinary flood is seen to be coming, the owner may protect his land from it, and so turn it away without being responsible for the consequences.

1. (1884) 3 Q. B. D. 131.

Visitations of locusts, though no doubt unpleasantly frequent, are in the nature of extraordinary and incalculable events, rather than a normal incident like the rise of a river in a rainy season. On the facts as found in this case their Lordships are of opinion that the respondents did no more than what *Lindley* L. J. has defined as being within their rights. But their conduct may be justified on a wider and simpler ground. Even if the invasion be regarded as a normal incident of agricultural industry in South Africa, the respondents would be entitled, as an agricultural operation, to drive the locusts away just as they are entitled to scare crows, without regard to the direction they may take in leaving.

National Phonograph Coy. of Australia *v.* Menik.

[1911] A.C. 336.

Patent of goods—Dealer in—Conditions imposed by patentee—Binding nature of.

The sale of a patented article carries with it the right to use it in any way that the purchaser chooses to use it, unless he knows of restrictions. Of course, if he knows of restrictions, and they are brought to his mind at the time of the sale, he is bound by them. He is bound by them on this principle; the patentee has the sole right of using and selling the articles, and he may prevent anybody from dealing with them at all. In as much as he has the right to prevent people from using them or dealing in them at all, he has the right to do the lesser thing, that is to say, to impose his own conditions. It does not matter how unreasonable or how absurd the conditions are. It does not matter what they are, if he says at the time when the purchaser proposed to buy or the person to take a license: "Mind I only give you this license on this condition," and the purchaser is free to take it or leave it as he likes. If he takes it he must be bound by the conditions. It seems to be common sense and not to depend upon any patent law or any other particular law. As to the attempt, however, to bind a purchaser to a condition not brought to his notice at the time of the sale, such an attempt cannot succeed.

Grand Trunk Railway of Canada v. Barnett.

[1911] A.C. 361.

Negligence—Suit for—Plaintiff trespasser — No right of suit.

Two systems of railway had a common station which had two platforms one for each. For mutual convenience as regards various railway purposes the trains used to go from one platform to the other. While a train which did not carry passengers was going from one platform to the defendant's platform, the plaintiff, who had no ticket, got on the footboard of the train without the knowledge of the responsible officers of the train, with a view to reach the defendant's platform which was near his home. While so going a train of the defendants collided owing to the negligence of the defendants' officers with the train carrying the plaintiff. The result was that the plaintiff, who knew that travelling on foot-board was against the bye-laws, was thrown off the foot-board and sustained severe injuries.

Held that plaintiff, being a trespasser both on the train on which he was standing and on the defendants' premises wherein he sustained injuries, is not entitled to recover damages, there being no duty on the part of the defendants towards the plaintiff.

Per Curiam :—The railway company was undoubtedly under a duty to the plaintiff not wilfully to injure him; they were not entitled, unnecessarily and knowingly, to increase the normal risk by deliberately placing unexpected dangers in his way, but to say that they were liable to a trespasser for the negligence of their servants is to place them under a duty to him of the same character as that which they undertake to those whom they carry for reward. The authorities do not justify the imposition of any such obligation in such circumstances. A carrier cannot protect himself against the consequences which may follow on the breach of such an obligation (as, for instance, by a charge to cover insurance against the risk), for there can be no contracts with trespassers; nor can he prevent the supposed obligation from arising by keeping the trespasser off his premises, for a trespasser seeks no leave and gives no notice.

The general rule, therefore, is that a man trespasses at his own risk.

Commissioner of Stamp Duties v. Byrness.
[1911] A.C. 386.

Advancement in favour of son—Receipt of rents by father—Consistency.

The fact that a father receives and is allowed to receive during his lifetime rents and profits of a property bought by him in the name of a son is not inconsistent with the purchase being a real advancement in favour of the son. The son's acquiescence in his father taking the rents and profits can be set down to good manners and deference, that is, the respect which a child owes to his parent. The receipt of rents and profits by the father cannot be taken to turn a presumptive advancement into a trust in favour of the father.

Rourke v. Robinson. [1911] 1 Ch. 480.

Mortgagor and mortgagee—Duty of mortgagee to reconvey—Conditional tender—Interest, stopping of.

Pending a redemption action, the mortgagor tendered the principal, interest and costs, requiring, at the same time, the mortgagee either to attend at her solicitor's office for payment and execute a reconveyance or at her option to execute a reconveyance escrow till payment of money. *Held*: The tender was sufficient to stop the further running of intrest. It is a part of every mortgage contract that the mortgagee should, on payment of what is due, execute a proper reconveyance. A demand for that which the party demanding is entitled to on payment does not make the tender conditional.

In re **Robinson : McLaren v. Public Trustee.**
[1911] 1 Ch. 502.

Suit for refund—Limitation—One 'cestui que trust' suing another—Action for money had and received.

An action by one *cestui que trust* against another for the recovery of money which ought to have been paid to him but, owing to a common mistake, was wrongly paid over by the trustee to the other, though not strictly the common law action for money had and received but only the analogous equity action for refund, is barred after the statutory period prescribed for the action for money had and received. The case is different where the court is administering the funds and adjusting the rights of parties and there are funds in court belonging to the party over-

paid. The case is also different where trust funds can be traced in the hands of the person receiving it, in which case he can be made to refund it. The third class of cases where limitation would not bar is where trust funds have been received by a person with the knowledge that they have been wrongly paid over to him.

Shepherd *v.* Croft. [1911] 1 Ch. 521.

Contract for sale of land—Latent defects known to vendor—Liability to be rescinded.

A contract for sale of land is not liable to rescission by reason of latent defects existing at the date of the contract which were not disclosed. When the defects are not such as to make the thing something different from the thing bargained for, a contract not liable to cancellation on account of such defects does not become so liable because the defects were known to the vendor at the time of the contract.

Osborne *v.* Amalgamated Society of Railway Servants, [1911] 1 Ch. 540.

Trade union—Action "to enforce benefits under"—"Action for reinstatement" not.

An action by a member of a trade union to be reinstated after an illegal expulsion is not an action seeking to enforce provisions " to provide benefits to members " which is not permitted by the Trade Union Act of 1871.

In re **South of England Natural Gas & Petroleum Company, Limited.** [1911] 1 Ch. 573.

Companies (Consolidation) Act, 1908, *S.* 81—*Omission to mention previous publication of prospectus—Remedy for—Damages or rescission—" Public offer ", meaning of.*

Section 81 of the Companies (Consolidation) Act of 1908 requires that at every subsequent circulation of a prospectus, every earlier circulation of the prospectus and public offer of shares ought to be stated with the result of such circulation. A circulation of a prospectus among the shareholders of a certain gas company in which the promoter was interested was not mentioned in a subsequent circulation of the prospectus. The prospectus, however, when first issued, purported to be " for private circulation only." Nevertheless it was *held* by *Swinfen Eady* J. that the earlier circulation involved a public offer of shares and ought to have been

mentioned at the subsequent issue of the prospectus. But he also *held* that in such a case the remedy of the allottee against the persons responsible for the prospectus was only in damages and not by rescission.

In re Mackenzie : Mackenzie *v.* Edward Moss.

[1911] 1 Ch. 578.

Domicil of a married woman—Contracts in consideration of marriage—The law to govern them.

A married woman is incapable of acquiring a separate domicil from her husband when there has not been a decree for judicial separation or its equivalent, divorce *a mensa et thoro*, except possibly in the exceptional cases referred to by Lord Cranworth in *Dolphin* v. *Robins*[1], viz., where the husband abjures the realm, deserts the wife, and establishes himself permanently in a foreign country or commits felony and is transported. That the wife could have got a decree for judicial separation if she so chose that the application of the husband for divorce has been rejected on the ground that he was guilty of cruelty that justified the wife living separately from him, and that, as a matter of fact, the husband and wife were living separately was not enough to enable the wife to acquire a separate domicil.

As a general rule, the law of matrimonial domicil is applicable to a contract in consideration of marriage, but this is not an absolute rule; it yields to the intention of parties, either expressed or to be gathered from all the circumstances of the case.

Bath *v.* Standard Land Company Limited.

[1911] 1 Ch. 618.

Trustee and "cestui que trust"—If company trustee, directors individually entitled to charge for services—No fiduciary relation between directors and "cestui que trust."

Per majority of the Court of Appeal.—There is nothing to prevent individual directors of a company, which has undertaken to manage an estate, from charging for their professional services. Directors stand in a fiduciary relation to the company but not to a stranger with whom the company is dealing. This principle applies equally whether the relation between the company and the stranger is one purely of contract such as principal and agent or is one of trustee and *cestui que trust*. To speak of directors as the brains of the company or the

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1. (1859) 7 H. L. C. 393.

hands of the company is only to use words which have no definite meaning in this connection.

Per Master of the *Rolls.*—A fiduciary relation can only arise either contractually or by implication of law. The contract between the corporation and *B* (whose property they were managing) is one to which the directors are not parties. Though under certain circumstances such a relation might arise by implication of law—for an instance see *Powell Thomas* v. *Evan Jones & Co.*—yet such a relation does not flow from the fact that the director was appointed for the purpose by a Board of Directors consisting of himself, though, if the appointment was not a proper one to be made under the circumstances, the company might be liable to the employer for breach of duty in that respect.

Per Fletcher-Moulton L. J.—Contra.

Neville J.'s judgment in [1910] 2 Ch. 408 reversed.

In re Towndrow : Gratton *v.* Machen.

[1911] 1 Ch. 662.

Specific legacy and legacy of the residue—For default in respect of latter, former not liable.

The ordinary principle that a trustee can take no share out of a trust fund without making good to it the amount misappropriated by him out of it has no application when the fund out of which reimbursement is sought is different from the fund in respect to which default is committed. For instance, when there is a specific legacy as well as gift of the residue subject to certain trusts, any default in respect of the trusts cannot be sought to be made good out of the specified legacy when the former has been assigned away by the time.

Mills *v.* United Counties Bank, Limited.

[1911] 1 Ch. 669.

Sale of equity of redemption in a contingent interest—Covenant to indemnify against mortgage—Conditional upon contingent interest vesting in possession—Excluded by express, limited indemnity.

Where the subject-matter of a sale is an equity of redemption, the purchaser, in the absence of an express contract to the contrary, must be regarded as covenanting with the vendor to

indemnify him against the personal obligation to pay the money due upon the mortgage, and a bill may be filed by the covenantee to be relieved from the debt provided the debt has accrued due. Neither the rule nor the reasoning of it applies when the subject-matter of the sale is a contingent interest and has not vested in possession. In the case of such interests, the obligation is conditional upon the interest vesting in possession.

The indemnity implied by law is excluded when an express and limited indemnity is provided for in the deed of sale itself.

Turner v. Turner. [1911] 1 Ch. 716.

Legatee, debtor to estate— When debt due from partnership, and not from legatee individually—Rule.

The rule that a legatee is bound to account for the debt owing from him to the estate before he can claim the legacy has no application where the debt is a joint debt owing from a partnership of which the legatee is a member.

In re **Coomber : Coomber v. Coomber.**
[1911] 1 Ch. 723 (C. A.)

Undue influence—Gift by mother to son managing business—No presumption of,—'Independant advice'; meaning of.

In this case there was a gift by a mother to her son who was managing her business. *Neville* J. threw the onus of disproving undue influence on the son, though he found as a matter of fact that there was no undue influence.

It is not true to say that any confidential relation between donor and donee is sufficient to set up a presumption against the validity of the gift. There are confidential relations in which there is a presumption of undue influence, *e.g.*, solicitor and client, a young person immediately after attaining age making a gift to his parent or other person standing *in loco parentis*. In such cases there is a presumption of undue influence which requires something to rebut it, but to apply that to every fiduciary relation is not according to authority and distinctly contrary to principle.—Per *Master of the Rolls*.

It is said that the son was the manager of stores and therefore there was a fiduciary relationship to his mother. This illus-

trates in a most striking form the danger of trusting to verbal formulæ. Fiduciary relations are of many different types. They extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other because of his infinite trust in him. All these are cases of fiduciary relations, and the courts have again and again, in cases where there has been a fiduciary relation, interfered and set aside acts which, between persons in a wholly independent position, would have been perfectly valid. Thereupon, in some minds, there arises the idea that if there is any fiduciary relation whatever, any of these types of interference is warranted by it. They conclude that every kind of fiduciary relation justifies every kind of interference. Of course that is absurd. The nature of the fiduciary relation must be such that it justifies interference. * * * It is possible that there might have been a transaction between the son and the mother, with regard to a purchase of this leasehold property in which the son would have to shew that he had given her full information in very possible way as to value. But in this case, the gift was not based on value in any way at all. Independent competent advice in this connection means that some independent person free from any taint of relationship or of the consideration of interest which would affect the act, should put clearly before the person what are the nature and consequences of the act. It is for adult persons of competent mind to decide whether they will do an act and I do not think independent competent advice means independent competent approval. * * From the clear language of an independent mind, they should know precisely what they are doing * * But when a man takes upon himself the responsibility of advising those who are not adults, who are not persons capable of managing their own affairs, in the broadest sense of the word, other conditions may arise.—Per *Fletcher-Moulton* L. J.

Between master and servant and between employer and bailiff or steward, there subsists, of course, a fiduciary relation, but there is no authority for the proposition that by reason of the existence of such relations a deed of gift from the one to

the other can be set aside. This doctrine of equity rests upon the existence of such a fiduciary relationship as will lead the court to infer undue influence or knowledge in the one party concealed from the other or other circumstances.—Per *Buckley* L.J.

In re **Connolly Brothers, Limited: Wood** *v.* **Connolly Brothers, Limited.** [1911] 1 Ch. 731 (C.A.)

Stay of proceedings—Courts of inferior and co-ordinate jurisdiction—No difference between—Ground for.

Proceedings by a person in a court of law may be restrained on three grounds: by reason of contract, or conduct, or when it is shown that the proceedings are vexatious or oppressive. It does not matter whether those proceedings are pending in a court of inferior jurisdiction or in a court of co-ordinate jurisdiction, as for the matter of that in a foreign court as in this, the court acts *in personam* against the party by way of injunction and does not address itself directly to the court. In this case, their Lordships, confirming the order of *Parker* J., stayed an action in the Palatine Court by a charge-holder seeking a first charge on some portion of a company's assets, pending an earlier instituted action in the High Court by the debenture-holders who also claimed a first charge, to which the person seeking to enforce the charge was not made a party as the debenture-holders were ignorant of the charge. Their Lordships at the same time directed that he should be made a party to the action of the debenture-holder so that his right might be determined and complete relief might be given to him on that basis.

West *v.* **Gwynne.** [1911] 2 Ch. 1. (C.A.)

Statute — Construction—Retrospective operation, rule as to—Meaning and scope of.

S. 3 of the Conveyancing Act of 1892 enacts that "In all leases containing a covenant * * * against assigning * * * without consent such covenant shall, unless the lease contains an express provision to the contrary be deemed to be subject to a proviso that no fine or sum of money in the nature of fine shall be payable for or in respect of such consent." The question arose

in this case as to whether this section applied to leases executed before the passing of the Act. Both *Joyce* J. in the court of first instance and the court of appeal held that it did. To the argument that statutes are not to be presumed to act retrospectively—*nova constitutio futuris formam imponere debet, non preteritis* — thus answers *Joyce* J.: "In the present case it is not contended that S. 3 does more than prevent the future exaction of a fine upon granting the necessary consent, this being effected by enacting that as from the date of the commencement of the Act all leases shall be deemed subject to the provision mentioned in the section. In other words, the lessor shall not in future exact a fine for his assent to an assignment unless it has been expressly stipulated that he should be able to do so. The section does not take away any accrued right of action nor is there interference with past transaction, nor does it affect, to my mind, anything which can aptly be termed a 'vested right'. The exacting of this fine may perhaps be more correctly called a privilege to require a payment in a certain contingent event than a vested right. Considering the express generality of the provision, viz., in all leases * * * I come to the conclusion that this section was intended to apply to every lease both existing and future * * * and in the absence of an express provision to the contrary 'to engraft' (using the words of *Cockburn* C.J.) 'upon every existing lease a very plain enactment and to this enactment we must give its proper effect.'

And thus the *Master of the Rolls*: "Retrospective operation" is an inaccurate term. Almost every statute affects rights which would have been in existence but for the statute * * Section 3 does not annul or make void any existing contract; it only provides that in the future, unless there is found an express provision authorising it, there shall be no right to exact a fine. I doubt whether the power to refuse consent to an assignment except upon the terms of paying a fine can fairly be called a vested right or interest. Upon the whole I think S. 3 is a general enactment based on grounds of public policy and I decline to construe it in such a way as to render it inoperative for many years wherever cases for 99 years, or it may be 999 years, are in existence."

Buckley L. J.—"To my mind, the word 'retrospective' is inappropriate and the question is not whether the action is

retrospective. Retrospective operation is one matter. Interference with existing rights is another. If an Act provides that as at a past date the law shall be taken to have been that which it was not that Act I understand to be retrospective. That is not this case. Suppose that by contract between *A* and *B* there is in an event to arise, a debt from *B* to *A*, and suppose that an Act is passed which provides that in respect of such a contract no debt shall arise. As an illustration take the case of a contract to pay money upon the event of a wager or the case of an insurance against a risk which an Act subsequently declares to be one in respect of which the assured shall not have insurable interest. In such a case if the event has happened before the Act is passed, so that at the moment the Act comes into operation a debt exists, an investigation whether the transaction is struck at by the Act involves an investigation whether the Act is retrospective. But if at the date of the passing of the Act, the event has not happened, then the operation of the Act * * is not a retrospective operation but is an interference with existing rights. As a matter of principle an Act of Parliament is not without sufficient reason taken to be retrospective. There is, so to speak, a presumption that it speaks only as to the future. But there is no like presumption that an Act is not intended to interfere with existing rights. Most acts of Parliament in fact do interfere with existing rights."

Kennedy L.J.—" If effect is given to the section in relation to leases already existing, it will not operate either to destroy or impair the validity of those leases or to take away any "vested right" as I understand the phrase. I do not think that an enactment which prevents the lessor from availing himself of the lessee's covenant not to assign without license as an indirect instrument of profit falls properly within the category of enactments which take away either vested rights or the legal character of a past transaction or which impair an existing contract and it is chiefly to such enactments that the rule '*nova constitutio &c.*' has been applied by courts."

In re Lacon's Settlement: Lacon *v.* Lacon.

[1911] 2 Ch. 17.

Damages for non-repair—Tenant for life not impeachable for waste—Remaindermen have no right thereto.

Damages recovered from a tenant in occupation for dilapidations to the house arising from breaches of repairing covenants belong to the tenant for life when he is not impeachable for waste and the remaindermen have no sort of claim upon it.

Wertheim v. Chiesutimi Pulc Company [1911] A. C. 301.

Breach of contract—Damages—Principle of awarding.

The object of awarding damages in a suit for damages for breach of contract is to put the party aggrieved so far as it could be done by recovery in the same position in which he would have been if the contract had been performed. This is a ruling principle and a just one. The rule which prescribes as a measure of damages the difference in market prices at the respective times—*viz.*, stipulated date for delivery and the date of breach or actual performance is merely designed to apply this principle and it generally secures a complete indemnity to the purchaser. But it is intended to secure only an indemnity. The market value is taken because it is presumed to be the true value of the goods to the purchaser. In the case of non-delivery, where the purchaser does not get the goods he purchased, it is assumed that these would be worth to him, if he had them, what they would fetch in the open market, and that, if he wanted to get others in their stead he could obtain them in that market at that price. In such a case the price at which the purchaser might in anticipation of delivery have resold the goods is properly treated. The purchaser not having got his goods should receive by way of damages enough to enable him to buy similar goods in the open market. Similarly when the delivery of goods purchased is delayed the goods are presumed to have been at the time they should have been delivered worth to the purchaser what he could then sell them for, or buy others like them for, in the open market and when they are in fact delivered they are similarly presumed to be for the same reason, worth to the purchaser what he could then sell for in that market, but if in fact the purchaser, when he obtains possession of the goods sells them at a price greatly in advance of their market value, that presumption is rebutted and the real value of the goods to him is proved by the fact of this sale to be more than market value and the loss he sustains must be measured by that price, unless he is

against all justice, to be permitted to make a profit by the breach of contract, be compensated for a loss he never suffered, and be put, as far as money can do it, not in the same position in which he would have been if the contract had been performed but in a much better position.

JOTTINGS AND CUTTINGS.

Notification.—In exercise of the power conferred by section 23 of the Sea Customs Act, 1878 (VIII of 1878,) the Governor General in Council is pleased to exempt nitrate of lime, calcium cyanamidel and mineral superphosphates from the import duty leviable thereon under item No. 10 of Schedule IV of the Indian Tariff Act, 1894 (VIII of 1894). * * *

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Attacks on the Judges.—MR. WINSTON CHURCHILL has again availed himself of the license of debate in the House of Commons to launch gratuitous and unseemly charges of partisanship and, even worse, of class interest against the Judges. Notwithstanding indignant protests, not confined, we are willing to believe, to one side of the House, he made clear the purely demogogic character of his attacks by proclaiming the necessity for 'some bulwark that would stand between the trade unions and the Courts', and he professed to have found such a bulwark in a Government official to whom power would be given to intervene in the 'warfare between the great hierarchy of the law and the workmen's Guilds.' It is not creditable to the Commons that such pernicious nonsense as this should be permitted from any of its members, and we are not surprised that the Deputy-Speaker has found it necessary to administer a sharp reproof to the erring Minister. If Mr. Churchill cannot control his antipathy to judicial control, he ought to be transferred as soon as possible to some other post than that he at present holds in the Government, because the Home Secretary is not only the dispenser of much judicial patronage, but he is specially the custodian of 'law and order' and public attacks on those who administer the law are inconsistent with his office. The Crown is not well served when the Secretary of State goes about to denounce, and to lower in the esteem of the people the whole judicial bench. The position of the judges was made secure against the Crown itself by the constitutional charter which provided that none of them should be removed except upon the Address of both Houses of Parliament. And there is no case where such an address has been presented against an English

judge, though abortive and unfounded proceedings have, indeed, been taken in the Commons against particular judges—Lord Abinger in 1843 and Sir Fitzroy Kelly in 1867—who had aroused the hostility of a section. All serious statesmen have maintained the view proclaimed by George III on his accession that 'the independency and uprightness of the judges of the land' is to be regarded as 'essential to the impartial administration of justice, as one of the best securities to the rights and liberties of the people, and as most conducive to the honour of the Crown.' No Minister can be allowed to declare open war on that universally-accepted view without danger to the whole State. *The Law Journal.*

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Outrages on Judges.—MR. ASQUITH has announced that the Government have under their consideration the question of the employment of judges in connection with the trial of election petitions, and the deplorable incident at the close of the hearing of the Hull petition, when Mr. Justice Ridley and Mr. Justice Bucknill had missiles thrown at them by the more reckless members of an excited mob, ought to induce the Government to hasten to produce any proposals for changing the present system which they may deem it advisable to make. Attacks on occupants of the Bench are, happily, very rare in this country, but there are indications that party feeling may now subject the judges who try election petitions to risks to which they ought not to be exposed. The perpetrators of such offences as that committed at Hull are beyond the powers of the judges to commit for contempt of court. An attack made upon a judge whilst not engaged in the performance of his judicial duties is punishable as an assault. This course was pursued when Sir George Jessel was fired at by a disappointed litigant at the entrance of the Rolls Court in 1878. Dodweil—that was the name of the culprit—was tried for the offence, but was acquitted on the ground of insanity and ordered to be detained during Her Majesty's pleasure. A similar course was taken when Judge Bristowe was seriously wounded by an angry suitor at the Nottingham railway station in 1889, the judge's assailant being tried by Baron Pollock at the Assizes and sentenced to twenty years' penal servitude. These, apart from the attack made by an incensed bailiff upon Judge Parry in the Manchester County Court in 1898, are the only outrages which have been committed upon members of the Bench in recent years. It may be hoped that the disrespect for the

Bench which certain persons would appear to be now encouraging will not result in adding to the number.—*The Law Journal.*

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Scandalum Magnatum.—Stoning of the Judges, such as followed after the delivery of the judgment in the Central Hull election petition last week, may not be the direct result of the wild and whirring language recently levelled against the Bench on public platforms and in the House of Commons, but it is, none the less, a manifestation of the lowering of respect for authority which is one of the worst consequences of such attacks Our forefathers, who kept in force for a period extending over 500 years the Statute of Richard II, making it a punishable offence to utter words in derogation of a judge or other great officer of the State, had a clearer perception of what was necessary for the preservation of the common weal than some of our latter day politicians; and we may have occasion to regret the repeal of that, with many other ancient statutes of the realm, in the year of the Jubilee of Queen Victoria. The quarter of a century which has since passed has brought about many changes, and there is no institution of the State which has not been challenged. The judicial Bench is the last to suffer, but the integrity and independence of the judges ought to be above all question from any political party, for on them depend the security of every institution and the liberty of every subject. The motion of which Mr. J. G. Butcher, K.C., M.P., has given notice, asking for an expression of opinion of the House of Commons on the language recently used by the Home Secretary with reference to the judicial Bench, and a declaration that 'the use of such language by the Home Secretary is directly calculated to degrade the administration of justice, and to bring the office of Home Secretary into contempt,' will afford an opportunity for a repudiation by all parties of any sympathy with such attacks. It is not to be tolerated that any imputation of loss of the general confidence in the impartiality of the judges in matters affecting 'class issues' or 'party issues' should rest on the authority of the Secretary of State, who performs with us the functions of a Minister of Justice; and, unless the imputations are withdrawn and the position of the judges clearly vindicated, the Home Secretary will certainly deserve, as the motion declares, 'the strongest censure of the House,' with all the consequences which follow from it.—*The Law Journal.*

CONTEMPORARY LEGAL LITERATURE.

An article on "Release and Discharge of Powers" appears in the May part of the *Harvard Law Review* in which the writer discusses how and when powers of various kinds which are four in number, each of which is again sub-divided into four classes, can be released and discharged, *i.e.*, extinguished by the person possessing the power either by deed or will. The writer elucidates his various conclusions by references to the leading text books and principal American and English cases. The article is well worth perusal.

In the same number there is an article on "A Proposed Uniform Marriage Law" in which the writer gives a history of the movement of the subject in the United States and discusses the provisions of a draft bill regarding the same with reference to the views prevailing in the United States and in Europe. The preliminary requisites for a marriage, such as applying for a license, issuing a license, the form of the marriage and the effect of breach of any of the conditions precedent for contracting a valid marriage, are also well discussed with reference to their utility and necessity.

A learned article headed "State Control of Public Utilities" appears in the June part of the *Harvard Law Review* in which Professor Wyman lays down the following propositions: (1) From the very earliest times it was felt that State control is necessary over undertakings which are of a public character to secure the public good. (2) Some restraint has always been exercised over such lines of industry as are of vital interest to the public. (3) Whether a business is a public business or not depends upon the situation of the public with respect to it (*i. e.*, largeness or paucity of such public undertakings). (4) The spirit of our present age demands that these great business enterprises shall be conducted in accordance with the requirements of society and that effecient regulation of public employment by sufficient law is the most pressing problem confronting the (American) nation. (5) People must be assured that the law is adequate to deal with the situation; that it has not only elaborated details to meet obvious wrongs seldom defended, but also enlightened comprehension to deal with the large policies openly justified

which are truly inconsistent with public duty. (6) All businesses, both public and private, are subject, to be sure, to that general police power of the State whereby in any civilised society the effort is made so to order things that one may not use his own so as to injure another. (7) That State control, *i. e.* supervision, instead of State ownership and operation should be exercised to check the uncontrolled action of public bodies. (8) That the protection of the people from the oppression of those who control their destinies leads to real liberty ; and (9) This principle of State control does not lead one to socialism. Indeed it saves one from socialism if truly understood.

In the August part of the *Law Magazine and Review* there is an article entitled "Scarlet (Lord Abinger) and His Methods" in which the writer gives the various causes that led to the incomparable success which Lord Advocate (Lord Abinger) was able to achieve before any jury. The following are some of them: (1) A clear and lucid statement of facts. (2) Not anticipating the defendant's case, lest he would give room for the jury to see whether there is anything in the plaintiff's evidence to support the defendant's case. (3) No exaggeration of the facts in the opening. (4) Avoiding matters involving professional technicalities. (5) Not making fine speeches or wandering from his case. (6) Cross-examining only with a view to enforce and illustrate the facts on which he meant to rely, leaving details to his Juniors. (7) Great attention to re-examination. (8) Analysing instead of taking notes of evidence. (9) Keeping a strict watch over the judge. (10) Never allowing himself to be bullied by the judge. (11) Short, vehement and perspicuous reply directed to the point so as to impress the jury. (12) Avoiding unnecessary repetition. (13) Never showing any resentment or obstinacy when the judge or jury are against. (14) Exposing any error in the point of law of the opposite side. (15) Mastering his temper. (16) Equal attention to trifling as well as important cases. (17) Addressing the jury in a familiar and intimate way. (18) Speaking in the simplest style without indulging in deep declamation or impassioned effusion.

There is an article in the same number on "The Place of Jurisprudence in Legal Education" in which the writer discusses the necessity and utility of jurisprudence in learning law and winds up by saying what part it ought to take in the curriculum of a law student's study.

BOOK REVIEWS.

The Law of Registration of Documents in British India: By Mr. D. C. BANERJEE, M.A., *Bar.-at-Law*: Published by Messrs. R. Cambray & Co., Calcutta:—A good commentary on the Registration Act is a great desideratum in India. It is now over a decade and a half when the late A. Rajagopalaiyar of the Madras Bar published his commentary on the Registration Act; and we know that a second edition of his book was in great demand. This commentary of Mr. D. C. Banerjee on the Registration Act is sure to supply the long-felt want. The notes are well arranged and the whole matter has been printed in bold type and on good paper. We are sure the profession will welcome this neat and handy commentary of Mr. Banerjee on the Registration Act.

An Analysis of Williams' Law of Personal Property: By A. M. WILSHERE, L.L.B. Published by Messrs. Sweet & Maxwell, Ltd., 3 Chancery Lane, London.—This is a neat analysis of Williams' Law of Personal Property. The analysis has been clearly and carefully done and at the end of the book is to be found an appendix of questions useful to students. The book is sure to be very useful to law students and we commend it to them. The get up is neat and leaves nothing to be desired.

Public Companies: Formation and Flotation: By BIRCHAM and F. J. C. MORRIS. Published by Mr. Effingham Wilson, 54, Threadneedle Street, E. C., London. Price 2/6 net.—To most people in this country, company law is untrodden ground. India is just interesting herself in commercial matters and to many who form and float companies and to others who are asked to take shares in new companies, an elementary knowledge in company law is a necessity. This little volume before us gives an idea of the basic principles underlying this branch of the law in a clear and concise form and we would highly commend it to both the layman and the junior lawyer who wishes to have a clear idea of the rudiments of this branch of the law. The authors have referred also to the leading cases on the subject in all their essential bearings and the whole subject has been dealt with in a way to afford easy reading to the layman and the

student. We welcome this book and would commend it to every person who has anything to do with companies and company law.

Starling's Indian Limitation Act: 5th Edition (1911): By Messrs. DANIEL CHAMIER and G. G. NADKARNI. Published by N. M. Tripathy & Co., Bombay. Price Rs. 10.—We welcome the 5th Edition of Mr. Starling's useful commentary on the Limitation Act. Now that the Limitation Act has undergone some revision by the Legislature the issue of a new edition of Mr. Starling's useful book on the Limitation Law of India is sure to be found very opportune and useful. We have nothing but praise for the way in which the whole matter has been arranged and dealt with, and we commend the book to the Profession.

The Court Fees Act: By S. N. RAY, B.L. Published by the Cranenburgh Law Publishing Press; 3 to 5, Bond Street, Calcutta. —This is a neat little commentary on the Court Fees Act. The book begins with an introduction explaining briefly the history of the enactment and at the end of the book are given in the form of appendices the various Rules framed under the Act for the Province of Bengal and other notifications; and lastly the sections of the Suits Valuation Act are given as appendix H. The get-up is neat and we wish the author every success.

A Selection of Legal Maxims: By HERBERT BROOM, L.L.D. Eighth Edition: By Joseph Gerald Pease and Herbert Chitty. London, Sweet and Maxwell, Limited. Price 30 *s.*— Broom's Legal Maxims is quite a standard work and it is a most useful and valuable book as it makes the study of law attractive to beginners, reminding the lawyer that the enforcement of the sound principles of law is the real secret of success in the administration of justice. The present editors do not depart in any way from Dr. Broom's method which has made the book so much a success and they have brought the book quite up to date. We have no doubt that the book will be found most useful by students, practitioners and judges.

The Law of Prohibition: By H.R. CURLEWIS, B.A., L.L.B. and D. S. EDWARDS B.A., L.L.B., *Barristers-at-Law*: With a Chapter on the Practice in England by W. J. Wrottesby of the Inner

Temple, *Barrister-at-Law*, London, Sweet and Maxwell, Ltd. Price 35 *s.*—With the progressive growth of reports upon various branches of law a book which deals scientifically with a particular department is specially useful and the authors are to be congratulated in bringing out a treatise on the Law of Prohibition which is one of the important branches of adjective law. It deals with a remedy where there is an excessive jurisdiction on the part of inferior courts. The cases bearing on the subject have been brought under appropriate headings and the whole subject is. treated so thoroughly that there is nothing to be desired. We trust the book will be found useful by practitioners and judges.

Burge's Colonial and Foreign Law: Vol. III, By WOOD RENTON and PHILLIMORE. Sweet and Maxwell, Limited, London. Price 5 Vols. £ 8-8.—This volume deals with the law of Marriage and Divorce—a very important branch of the law of persons. We had occasion to review the previous volumes and the present volume maintains the reputation of the preceding volumes. The book is bound to be useful to lawyers as an authoritative guide in the ascertainment of foreign laws.

The Law of Mortgage in India: (Tagore Law Lectures: 1875 76. By RASHBEHARY GHOSE, M.A.D L., Fourth Edn. Vol. I. pp. 683. Publishers, Messrs. Thacker Spink & Co., Calcutta. Price Rs. 12:—Dr. Ghose's book on Mortgages has become a standard work on the law of mortgages in India and little introduction is therefore needed for such a work. The enormous growth of precedents in this branch of the law is sufficiently evidenced by the necessity which the author has felt in giving this edition in two volumes instead of in one as it was formerly. Since the publication of the last edition a considerable number of cases have cropped up and the author has to be congratulated on his having brought the edition up to date without any substantial increase in bulk.

The Law of Ejectment: By JOHN HERBERT WILLIAMS, L.L.M., of the Middle Temple, and W. P. YATES, B.A., of the Inner Temple. London, Sweet and Maxwell, Limited, Price 20 *s.*—Sixteen years is sufficiently long enough for a new edition,

William Yates' book on the law of ejectment has been found to be a useful book on the law on which it deals and the authors have to be congratulated in presenting to the public a new edition of such a work with the law brought up to date. We trust the book will be found useful.

Byles on Bills: By W. J. B. BYLES and E. R. WATSON, 1911: Sweet and Maxwell, Ltd. London. Price 2 5*s*.—Hardly any introduction is needed for such a stan'ard work as Byles on Bills. Twelve years is sufficiently long enough for a new edition of this work. The Editors have, in compliance with the criticisms on previous editions, adopted the actual words of the Bills of Exchange Act of 1882 instead of a paraphrase of the words of that Act. The Editors have also revised the cases cited in the foot-notes so as to bring in only cases of practical importance in the present day. The Editors have also given in an appendix the German Law on the Bills of Exchange by Mr. Sydney Leader. The book maintains the reputation of its predecessors and is bound to be useful to all those concerned in commercial law.

The German Law of Bills of Exchange and Cheques: By SYDNEY LEADER :—The German Commercial Law is an essential factor in any system of commercial law and the translator has to be congratulated upon his rendering into English the German Law of Bills of Exchange and Cheques. Both for a comparative study and for a reference on questions of international law, the book is bound to be useful.

The International Law Directory for 1911: By PHILIP GRABURN KIME. London, Butterworth & Co., Temple Bar.—We have reviewed this annual publication in our prior volumes. The book will be useful, as we have said on former occasions, to those who are in a difficulty in finding out the names of practitioners in foreign countries. The information regarding India is very scanty and the whole matter relating to India is contained in about two pages. We would suggest to the Publishers the importance of giving more detailed and useful information regarding India in this otherwise very useful Directory in its future editions.